United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2086

To be argued by
ANTHONY J. D'AURIA

United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE FELDMAN, Trustee in Bankruptcy of LEASING CONSULTANTS INCORPORATED, Bankrupt

Plaintiff-Appellant,

against

NATIONAL BANK OF NORTH AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE NATIONAL BANK OF NORTH AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTES AND RULES

Bankruptcy Act

Federal Aviation Act of 1958

Ship Mortgage Act of 1920

New York Uniform Commercial Code

New York Real Property Law

Federal Regulations

Commentators

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Preliminary Statement

This case is really a simple one. It involves the rights of National Bank of North America ("National") under a secured promissory note and a chattel mortgage executed by the bankrupt Leasing Consultants Incorporated ("LCI"), the validity of which has never once been challenged by the trustee. Because the terms of that mortgage so clearly provide that the Bank is entitled to the precise payment sought to be recovered in this action, the trustee in his brief to this Court, as in his brief in the Court below, has attempted to minimize the full effect of that chattel mortgage by obfuscating its significance. Thus, the Trustee argues that the mortgage secured merely a "reversionary interest" without explaining why that characterization is justified or how it is a limitation of the Bank's rights. He contends alternatively that the mortgage secures nothing, on the astounding theory that an unrecorded option granted by the bankrupt lessor had converted the lease into a sale, and he challenges a separate

assignment of rentals without ever demonstrating how the alleged failure to record the assignment impairs National's rights under the properly recorded mortgage and the standard assignment of rents therein.

Judge Weinstein found all of these theories to be unpersuasive and properly concluded that the essential document governing the rights of the parties was indeed the chattel mortgage the provisions of which, under the well settled law, mandate the Bank's success in this action.

Having concluded that National was entitled to prevail under the mortgage, Judge Weinstein did not pass upon the other grounds urged by National in support of its motion. Those points, that there is no statutory requirement that the assignment of rents be recorded; that the trustee has no standing to challenge the lack of recordation; and that this action is time barred are set forth herein and are independent bases for sustaining the dismissal of the complaint.

Judge Weinstein, however, did have occasion to consider the fact that for over two years the Trustee treated National as a secured creditor under the mortgage and permitted it to receive the very funds the Trustee is now contending National is not entitled to. And it was this unembarrased change of position by the Trustee and the lack of merit of his posture that prompted Judge Weinstein to note that nothing he had said should be construed "to indicate that I believe that the trustee's action in taking this matter to court was justified or that the trustee is entitled to any fees for this kind of litigation" (J.A.140).

The Trustee has offered nothing in his brief to this court upon which to base a contrary determination or a more charitable characterization of the substance of his claim.

The Facts

The bankrupt was engaged in the business of leasing machinery, equipment and aircraft. In April, 1969, LCI leased a North America Sabre Liner to Grant Company (hereinafter "Grant") for a term of eight years and at a monthly rental of approximately $11,000.

In March, 1970, LCI applied to National for a loan of $500,000 and offered to secure that loan by an assignment to National of the rentals generated by the Grant lease. This proposed assignment of lease, by itself, was not adequate security for the loan. The assignment alone would have afforded no tangible protection to National in the event Grant defaulted on the lease and LCI defaulted on its obligation to the bank. In that event, National would have been in a wholly unsecured position. Accordingly, National insisted, as a condition of the loan, that it obtain a security interest in the aircraft leased to Grant as well.

On March 13, 1970, the loan to LCI was made and in consideration therefor LCI executed a secured promissory note calling for monthly installment payments, a chattel mortgage on the aircraft and an assignment of the Grant lease. (J.A. 13, 22, 27, 60). The chattel mortgage contains its own assignment of rents which provides in part, that upon the happening of an event of default National has the right "to take possession of all or any part of the Mortgaged Property and to exclude the Company . . . wholly or partly therefrom . . . [and to] collect and receive all rents, issues, profits, revenues and other income of the same and every party thereof" (Mortgage § 4.3, J.A. 48).

That chattel mortgage was duly recorded by the Bank with the Federal Aviation Agency, as is required by 49 U.S.C. §1403. In addition, National filed form U.C.C. 1 financing statements with the Register of the City of New York and with the New York Secretary of State, giving

notice of its interest in the rentals (J.A., 15, 75).* Finally, National took possession of the chattel paper assigned in the transaction (i.e. the lease, New York Uniform Commercial Code § 9-105(b)). National did not record the assignment of lease with the FAA.

After the making of the loan, Grant remitted its monthly lease payments to National. These payments were deposited in LCI's checking account maintained at National and National regularly debited that account in satisfaction of the monthly installments due under LCI's note and mortgage (J.A. 8). On October 16, 1970, LCI was adjudicated a bankrupt, an event constituting a default under the Mortgage (Mortgage § 4.1(H), J.A. 20). However, LCI's bankruptcy did not disturb the payment arrangement above described and National continued to debit the LCI checking account with the full knowledge and consent of the Trustee. Indeed, in 1971, in a court application for leave to sell the aircraft, the Trustee acknowledged the validity and primacy of National's lien on the aircraft and its right to rental payments (J.A. 62-68). In these circumstances, National had no occasion to declare a default and to accelerate the debt.

In 1973, after National had received during a period in excess of three years over $440,000 in reduction of the principal and interest due on the mortgage note, the Trustee claimed to have discovered an infirmity in National's security position resulting from its failure to record the separate assignment of lease with the FAA. At about the same time, Grant offered to purchase the aircraft at a price approximating its market value. Both National and the Trustee

* In a footnote on page 21 of his brief, the Trustee claims that the U.C.C. filing was inadequate because LCI's office was in Nassau County. This statement is completely outside the record and appears to be the premise of an entirely new contention by the Trustee. Such extra-record reference is, of course, improper.

consented to the sale and entered into a stipulation to that effect (J.A. 109-112).

The Trustee has, without justification, thrust that stipulation into this litigation in an attempt to confuse the nature of that transaction. Despite the fact that Grant acknowledged that it was purchasing the aircraft (J.A. 103), the Trustee attempts to cast that sale as a prepayment of rentals so that the purchase price be considered paid pursuant to the alleged invalid assignment of lease rather than in satisfaction of the valid chattel mortgage.

Suffice it to say that the stipulation made possible the sale of the aircraft which would not have been possible had National not released its recorded chattel mortgage (Stip. ¶ 13, J.A. 111). National agreed to release its mortgage only because the stipulation provided that an amount equal to the unpaid balance thereon be put in escrow so that it could argue that the validity of its mortgage entitled it to the money (Stip. ¶¶ A and C, JA. 111).

In short, as is customary in matters of this kind, the stipulation was to serve no purpose other than to permit the sale of the aircraft free of National's lien with the lien attaching to the proceeds. Indeed, this is precisely how the Trustee characterized the transaction in a letter to Judge Weinstein (J.A. 144-146); it was the precise relief he had sought from the bankruptcy court immediately prior to the execution of the stipulation (J.A. 62-67); and it was the very same way he characterized the mechanics of a sale to Grant on its offer to purchase the plane in 1971 (J.A. 62-67).

In point of fact this was exactly how the proceeds from the sale to Grant were handled. There was set aside in escrow in a special deposit held by National, to await a determination of the Trustee's claims, the sum of $160,473.44 representing the principal balance and accrued interest remaining due on the note and mortgage (Stip. ¶ C, J.A. 111), and in consideration thereof National

released its mortgage, and the Trustee gave Grant a Bill of Sale.

The Trustee thereupon commenced this suit to recover all amounts received by National subsequent to the filing of the petition in bankruptcy and also the amount held by National in the special deposit. Although the complaint contains two causes of action, the first to recover the payments received by National and the second for a declaration of the Trustee's right to the escrowed amount, it rests on a single legal theory, namely, that National's chattel mortgage was a nullity, and that the amounts collected by National after bankruptcy and those held by it in the special deposit were collected under an invalid assignment of lease.

Proceedings Below

The matter came on in the Court below on cross-motions for summary judgment; National moving for judgment dismissing the complaint on the ground, among others, that its mortgage was all encompassing and the Trustee moving for judgment on his two causes of action on the ground that the mortgage and assignment of rents were invalid.

With the issues thus framed and after hearing lengthy argument, Judge Weinstein denied the Trustee's motion, holding that the attacks on the mortgage were untenable. Judge Weinstein found that the mortgage was a valid and subsisting one and he held that, pursuant to its terms, National was entitled to the monies it had collected and to the balance of its mortgage debt represented by the escrowed account (J.A. 122). Judge Weinstein rejected the theory that any alleged defect with respect to the assignment impaired the mortgage, stating:

> ". . . nothing really turns on the question of the assignment of lease, since the chattel mortgage is the primary document relied upon" (J.A. 123).

In these circumstances the Trustee's claim that Judge Weinstein somehow overlooked the first cause of action is specious. This claim was made to and rejected by Judge Weinstein on the Trustee's motion for reargument (J.A. 147-153). The first cause of action is no different from the second and depends for its success upon a resolution of the same legal and factual questions. It is obvious that a determination of the validity, scope and content of National's mortgage is dispositive of both causes of action, since National's right to retain the monies collected and to recover the balance due is predicated on the same operative document, the chattel mortgage.

By concluding that National's mortgage entitled it to receive the payments in question the Court below passed on both causes of action. And having determined that neither survived analysis, it was entirely proper for the Court to order the release of the special deposit in National's hands from the escrow. For it necessarily follows from a determination of the primacy of National's mortgage lien that it is entitled to the balance of the sale proceeds to which the lien of the mortgage was consentually transferred.

Nor did the Court award to National the whole proceeds of the sale of the aircraft ($433,705.58) on an unpleaded counterclaim to foreclose the mortgage, as the Trustee contends (Brief, pp. 14, 44-45). National's motion requested no such relief; the Court's opinion grants no such relief; the order and judgment appealed from provides for no such relief; and National has not sought to collect on the "granting" of its "unpleaded counterclaim".

Thus, the Trustee's argument, that by granting National all of the sale proceeds, Judge Weinstein thereby created an offset against the first cause of action which he somehow "ignored" (Brief, p. 14), is both unavailing and confused. The simple fact is that Judge Weinstein found that

National was entitled to retain what it had been paid and to recover what was due, a result sanctioned by the stipulation of the parties. And the same result should obtain on appeal since the Trustee's attacks on the mortgage have not improved with their repetition.

Questions Presented

The Trustee recognizes that to prevail on the appeal he must destroy the effectiveness of National's mortgage. And the attack he mounts on that instrument is a varied one. In the first instance, he ignores the mortgage completely and stresses the alleged invalidity of the assignment of lease without once demonstrating how the defect in the latter impairs the enforceability of the former. Alternatively, he claims that the mortgage attached to nothing since LCI entered into a conditional sale contract with Grant and did not have title to the aircraft to support a mortgage but fails to disclose the fact that all of the statutory prerequisites for characterizing the transaction a conditional sale were not fulfilled.

It is apparent then, that the principal questions to be determined on this appeal relate to National's rights as chattel mortgagee. The subsidiary questions relate to the Trustee's right to maintain this action.

1. May National be deprived of its rights as chattel mortgagee because of its failure to record, not the chattel mortgage, but the assignment of lease?

2. Is the assignment of lease a conveyance required to be recorded under the Act?

3. If the assignment is such a conveyance was the recording requirement sufficiently complied with by explicit reference to the assignment in the recorded mortgage?

4. Does the Trustee, exercising the rights of hypothetical lien creditors pursuant to section 70c of the Bankruptcy Act*, have "actual notice" (as that term is used in the Federal Aviation Act) of the assignment of lease from the recorded reference thereto.

5. Can the transaction between LCI and Grant properly be characterized as a conditional sale as against National, since the alleged option, a necessary element of such a transaction, was never recorded and National had no "actual notice" thereof?

6. Assuming arguendo, the transaction may have been a conditional sale, did the security interest granted to National by LCI nevertheless attach to the aircraft and its proceeds?

7. Since the Trustee is now seeking to advance a right existing only under Section 70c of the Bankruptcy Act on behalf of hypothetical lien creditors (there being no actual lien creditors), is he barred by the two year statute of limitations contained in §11e of the Bankruptcy Act?

8. Does this Trustee representing a hypothetical lien creditor have standing to contest the assignment of lease, or do the recording provisions of the Federal Aviation Act protect only subsequent purchasers and encumbrancers who relied on the record?

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* The complaint alleges that this action is based upon §70e of the Bankruptcy Act, 11 U.S.C. §110(e). That section permits the trustee to attack a transfer only if an actual creditor with a provable claim were empowered to do so. The trustee has apparently abandoned his reliance on that section, since he now cites only section 70c of the Bankruptcy Act which grants him the right of a hypothetical lien creditor at the moment of bankruptcy.

ARGUMENT

POINT I

National is entitled to the rentals and to the proceeds of sale of the mortgaged property under the terms of the Mortgage and Applicable Law.

A. The Mortgage provides for the payment of the rents to the bank.

The Mortgage executed by LCI and recorded with the Federal Aviation Authority sets forth in detail the rights of the respective parties thereto. It makes several explicit references to the Grant lease and gives National the right to take possession of the mortgaged property upon default and "to exercise all rights and powers of [LCI] in respect of the Mortgaged Property . . ." (J.A. 48). As is customary, the mortgage contains a specific assignment of the rental payments effective on default (separate from the pre-default assignment of lease challenged by the Trustee) by conveying to National the right to collect all rents and profits arising from the property (J.A. 48). In addition, National is granted the right, on default, to sell the property (J.A. 49-50) and to "divest [LCI from] all right, title, interest, claim and demand whatever to the property sold . . ." (J.A. 51). In substance, the mortgage gives to National all of the traditional rights and remedies of a mortgagee. And in view of the fact that National collected the rents without objection, both before and after bankruptcy, there is no question but that, as mortgagee, it is entitled to those rents without the necessity of foreclosure proceedings. *In re Berdick*, 56 F.2d 288 (S.D.N.Y. 1931); *In re Brose*, 254 Fed. 664 (2d Cir. 1918); *Sullivan* v. *Rosson*, 223 N.Y. 217, 119 N.E. 405 (1918).

B. National is entitled to the rents under the Uniform Commercial Code.

Although the Federal Aviation Act ("FAA") undoubtedly preempts the field as to place and manner of recording liens on aircraft, it makes no provision for the enforcement of those liens. Resort must be had to state law which, in this case, is the Uniform Commercial Code. *See*, Uniform Commercial Code §9-104, Comment 1; II Gilmore, Security Interests in Personal Property §13.5; *State Securities Co.* v. *Aviation Enterprises, Inc.*, 355 F. 2d 225 (10th Cir. 1966); *Industrial National Bank of Rhode Island* v. *Butler Aviation International, Inc.*, 370 F. Supp. 1012 (E.D.N.Y. 1974); *Northern Illinois Corp.* v. *Bishop Distributing Co.*, 284 F. Supp. 121 (D. Mich. 1968); *Texas National Bank of Houston* v. *Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964). Although a case outside the line of authority, *Dowell* v. *Beech Acceptance Corp. Inc.*, 3 Cal. 3d 544, 476 P. 2d 401 (1970), *cert. denied* 404 U.S. 823 (1971) holds that the FAA preempts state law as to both recording of liens and their priority, the Court did not pass upon which law governs the enforceability of liens, once recorded. Indeed section 1406 of the FAA specifically provides that the validity of all recorded conveyances is to be governed by state law.

The Code provides remedies equivalent to the contractual provisions contained in the chattel mortgage. Uniform Commercial Code §§9-503, 9-504. The Code itself sets forth the rights of a mortgagee upon default. Section 9-503 grants to the secured party the right to take possession of the collateral even without judicial process if this can be done peaceably. *Shirley* v. *State National Bank of Conn* (2d Cir., Feb. 14, 1974); *Adams* v. *Southern Calif. First National Bank*, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3281 (Nov. 11, 1974).

Section 9-504(1) grants to the secured party the right to sell, lease or otherwise dispose of any of the collateral.

Section 9-504(3) grants to the secured party the right to sell the chattel even by private sale.

Section 9-504(4) provides that when collateral is disposed of by a secured party upon default:

> ". . . the disposition transfers to a purchaser for value *all* of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto." (Emphasis added.)

C. National's rights are not impaired by the bankruptcy.

The rights bargained for by National as set forth in the mortgage and those to which it is entitled under the Code were in no way diminished by LCI's adjudication as a bankrupt. The Trustee stands in the shoes of the Bankrupt to the extent of the bankrupt's interest in property. *See, e.g., Janney* v. *Bell,* 111 F.2d 103 (4th Cir. 1940); *In re Solomon,* 40 F. Supp. 62 (E.D. Pa. 1941). A chattel mortgage, absolute as of the date of bankruptcy, is not invalidated by that bankruptcy. *In re American Motor Products Corp.,* 98 F. 2d 774 (2d Cir. 1938). The Trustee takes the bankrupt's property subject to the lien of the recorded chattel mortgage. *Matter of James, Inc.,* 30 F. 2d 555 (2d Cir. 1929), 4 *Remington on Bankruptcy* §1728 (rev. ed. 1956).

The very purpose of a mortgage or other security is to permit a secured party fully to realize on his collateral after the default and bankruptcy of his mortgagor and research has revealed no reported case even questioning this right.

D. The Trustee has openly acknowledged National's right to the rentals and should now be estopped from claiming the contrary.

National's rights as chattel mortgagee are so clear and well settled that the Trustee himself openly acknowledged their primacy. For over three years the Trustee permitted the Bank to collect in excess of $400,000 without once challenging National's right to do so. Moreover, in a petition to sell the aircraft filed in June, 1971, long after LCI's bankruptcy, the Trustee conceded National's right to the rentals in the precise fashion urged by the Bank here. Thus, in that petition to sell the aircraft the trustee stated:

> "Thereafter on March 13, 1970 the bankrupt mortgaged said lease and aircraft to National Bank of North America. Said chattel mortgage was duly recorded, with the FAA . . . on April 30, 1970" (Petition ¶3, J.A. 64).

That petition continued:

> "[The rentals due under the lease are] subject to a recorded mortgage in the hands of National Bank of North America" (Petition ¶6, J.A. 65).

In his brief in support of that petition, the Trustee described the transaction exactly as National does in this litigation:

> "On March 13, 1970 the bankrupt borrowed $500,000 from [National] on a five year note and collateralized the loan with the Grant lease and airplane. National apparently perfected its security interest by taking possession of the original lease document and filing with the FAA" (Brief, p. 1).

The Trustee then acknowledged what he seeks to deny here, stating:

> "The Trustee *willingly concedes* that National, as a *secured creditor*, is entitled to the unpaid principal, interest accrued until payment of the residue of the Bank's overdraft" (Brief, p. 2, emphasis added).

In light of this explicit recognition of National's rights, the Trustee's newly advanced theories that National did not collect the rentals under the mortgage but under the assignment, or that the mortgage attached merely to a reversion or that National should be barred by laches since it never sought to foreclose the mortgage, are, at the least, suspect.

In advancing the claim that National received payment under the assignment of lease rather than under the mortgage, the Trustee is caught in an inconsistency inherent in his entire argument. For he alleges in this action that the remaining mortgage debt is merely $160,473.44 (J.A. 5-6). Now the mortgage debt was reduced to that amount only because the payments made by Grant were applied against the installments of the mortgage debt evidenced by LCI's promissory note. Obviously if the payments made by Grant subsequent to the bankruptcy (amounting to $440,562.50) had not been so applied, the mortgage indebtedness would be in excess of $600,000. Thus the Trustee's claim that the payments were not received pursuant to the mortgage is belied by his own recognition of the event.*

Indeed, even on appeal, the Trustee cannot escape from the fundamental defect of his argument. Thus the Trustee acknowledges that Grant's rents were not directly paid to National but into a bank account at National, established by LCI and controlled by the Trustee (Brief, p. 8). This account was debited monthly by National, with the obvious

* If for any conceivable reason the Court should hold that National is vulnerable as to the payments received subsequent to the bankruptcy, the mortgage debt will be correspondingly restored in amount, and National will claim the whole proceeds of the sale of the aircraft under its first mortgage lien.

knowledge and consent of the Trustee. In these circumstances, it is clear that National was not receiving payments from Grant, but from all of the funds in LCI's account. Accordingly, all of the Trustee's arguments about the validity of the assignment of rents are totally irrelevant.

Equally unavailing is the Trustee's claim that, despite his open recognition of National's right to collect the rents under the mortgage, National should now be barred from asserting its right under that mortgage because National never instituted foreclosure proceedings. Although National did not seek to take possession of the aircraft, apply to have the rents segregated by order, foreclose its mortgage or sell the craft,* this was only so because the Trustee openly and publicly acknowledged National's rights to the rentals and consented to the application of those rents in reduction of the LCI loan. Since under these circumstances, National was receiving exactly what it had bargained for, it had no occasion to assert its forelosure rights under the mortgage.

If at the outset of the bankruptcy, the Trustee had attacked National's position or challenged the assignment of rentals or attempted to interfere with the payments being made by Grant, then National would have immediately enforced its rights under the default clause of the Mortgage as mortgagee, without regard to its rights as assignee of the rentals under the assignment of lease. By sitting on his "rights" for all of these years, the Trustee has tried to place

* Those events constituting defaults and triggering the Banks right to collect the rents, foreclose or sell were specifically set forth in the Mortgage. The filing of a petition in bankruptcy alone was sufficient grounds upon which to predicate a default (§ 4.1(H), J.A. 46). Manifestly, if there had been any interruption in the receipt by the Bank of payments made by Grant, that too would have been a default (§ 4.1(A), (D), J.A. 44, 45). Moreover, in his statement filed pursuant to Rule 9(g) the Trustee conceded that LCI's adjudication was an event of default under the mortgage (J.A. 76).

National in the position of having to defend the assignment of lease to the exclusion of its rights as chattel mortgagee.

The Trustee should not be permitted to profit from his own inaction. It is well recognized that a "trustee in bankruptcy can be estopped to the same degree as any other party." *Brownstein* v. *Aluminum Reserve Corp.*, 245 F.2d 82 (2d Cir. 1957); *Lawson* v. *First State Bank of Vienna*, 21 F.2d 936 (8th Cir. 1927). It is equally clear that a trustee may be prevented from asserting rights he may otherwise have had if, because of this delay in so doing, others have suffered detriment. Indeed, Judge Weinstein has already had occasion to apply these equitable doctrines against this Trustee in this very bankruptcy. *In the Matter of Leasing Consultants, Inc.*, Civ. No. 70B 656 (E.D.N.Y. August 2, 1973). The facts in this case are no less compelling. Here, but for the Trustee's conduct, National would have asserted its full rights as chattel mortgagee. It should not now be prevented from doing so because of its reliance on the Trustee's conduct. On the contrary, National's rights should be measured as of the date of bankruptcy. On that date, it had a valid and subsisting chattel mortgage, the enforceability of which would have been recognized by the bankruptcy court. On that date National had the right to foreclose its mortgage subject to Grant's rights as lessee and therefore to continue to receive rent payments. Its rights should be no less today.

E. The Trustee's characterization of National's rights as "reversionary" is unavailing.

In a clever attempt to confuse by label what he cannot demonstrate by analysis, the Trustee claims that as lessor of the aircraft, LCI retained only a reversionary interest therein and that National's mortgage attached merely to that reversion. In advancing this claim the Trustee suggests that despite the fact that LCI was entitled to receive

the lease payments during the term of the lease, it was not free to pledge those rentals, since the only "real" right it had was the reversionary right to obtain the aircraft upon Grant's default or upon the expiration of the lease. The *reductio ad absurdum* of this argument is that LCI could default on its payments to National with impunity, suffer foreclosure under the mortgage and nevertheless still be free to collect the rent from Grant, all because the only right conveyed to National was the mythical reversionary one.

The fact is, that in a true lease transaction, the lessor retains far more than a "reversionary" interest. Indeed, the lessor remains the owner of the property and has all of the emoluments of that ownership, including the right to receive the rentals. There can be no question but that as owner of the property, LCI could and did encumber its rights of ownership by conveying a chattel mortgage security interest to National. Nor is there any question but that such a security interest reaches the lessor's right to receive the rentals. Not only is the specific provision in the mortgage to that effect enforceable, *see, In re Berdick,* 56 F.2d 288 (S.D.N.Y. 1931), but Section 9-504 of the Code declares, as well, that upon default, the secured party is entitled to "all of the debtor's rights (in the collateral)."

It is equally clear that there is no requirement that a secured party obtain a pre-default assignment of rents in order for the chattel mortgage security interest to attach to those rents upon default.

There is nothing in this statement of the rights of a chattel mortgagee that is in any way astonishing or novel; nor could there be. These rights of a secured party are too well settled and too well recognized to admit of a contrary interpretation. And it is precisely this recognition which the Trustee himself gave to National's rights. To permit him to now withdraw that recognition upon his unreasoned and unsupported theory of "reversion" is as unjustified as it is unfounded.

POINT II

National's rights as mortgagee are unaffected by the assignment of lease.

In considering the nature of the trustee's attack on the mortgage it is significant to note that he never once challenges its validity or priority although by his "reversion" argument he tries to give it little scope. Indeed he even concedes that the mortgage was duly recorded with the FAA. (9(g) Statements, ¶ 5, J.A. 15, 75). However, the Trustee does argue that a separate instrument, the assignment of lease, is invalid because it was not similarly recorded.

The unstated assumption of this argument appears to be that any infirmity with respect to assignment necessarily destroys the unquestioned enforceability of the chattel mortgage. This position is without authority in the law and distorts the transaction in question beyond recognition.

As security for its loan to LCI National sought to obtain two distinct sets of rights. The first was a present pre-default right to receive the rents generated by the Grant lease. This right was reflected in the assignment of lease. In addition, National sought a security interest in the aircraft itself, with the usual right to rentals on default. This right was embodied in the chattel mortgage.

In large measure security interests are quiescent rights that ripen only upon default of the debtor. Until that time, a secured party ordinarily has no claim to the possession of the collateral or to the rent it generates—and the debtor is free to use that collateral and those rentals as it sees fit.

Thus, pre-default and post-default rights are separate and distinct. The Bank need not have sought and might

not have obtained pre-default rights and this omission would not have diminished the vitality of its post-default rights. In the absence of pre-default rights the Bank could have been assured that upon disposition of the collateral after default, it could obtain "all of the debtor's rights" in the collateral. Uniform Commercial Code § 9-504. Indeed, § 9-502(1) of the Code makes clear that under the assignment of the rents in the mortgage and even before final disposition, the Bank was entitled to notify Grant to pay the rents to it. Thus, that section states:

> "When so agreed and *in any event on default*, the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral . . ." (Emphasis added.)

It has never been held that in order to assure a secured party's post-default rights, he must obtain pre-default possessory rights to the collateral. Yet, it is precisely this pre-default prerequisite that the Trustee seeks to establish in this case, for he is apparently seeking to transfer to National's chattel mortgage the alleged infirmities besetting the assignment of lease.

However, the alleged invalidity of the assignment should not affect the Bank's post-default rights or work as a forfeiture of those rights or operate to penalize National so that it is in a worse position for having attempted to obtain an assignment than if it had never made such an attempt. In short, if the assignment is invalid, then National's rights should be considered as if there had never been such an assignment. So considered, it is clear that the Bank had all of the rights of a secured

party on default—including the right to receive all of the rentals.

The fact that a secured party may fail with respect to one aspect of its collateral without affecting another was recognized by this court in this very bankruptcy in *In re Leasing Consultants, Inc.*, 486 F. 2d 367 (2d Cir. 1973). That principle applies with equal force here. That the unimpaired security interest provides greater rights or subsumes, upon default, the rights of the "impaired" security interest in no way should alter the application of that principle.

This policy is expressed in the Bankruptcy Act itself. In 1966, § 70c, 11 U.S.C. § 110(c) on which the trustee relies, was amended to provide, among other things, that:

> "If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee."

In the House Report discussing this aspect of this amendment, it is stated:

> "'If a security transaction or other transfer involving a debtor's property is valid in part against creditors whose rights and powers are conferred upon the trustee by the proposed amendment, it seems clear that it should be valid to the same extent against the trustee. While nothing in the proposed or existing legislation empowers the trustee to invade interest that no creditor described in the new version of the "strong-arm" clause could have reached, it has been thought advisable not to leave this limitation in the realm of inference. Thus, a security transaction involving property located in more than one county or State may be perfected against creditors having the rights conferred upon the trustee by the proposed subdivision, only in respect to the property located in one of the juris-

> dictions. The security transfer would remain valid against the trustee under the proposed section 70(c) insofar as property in the one judisdiction is covered. In like manner, a security transaction duly perfected as to one kind of property but not as to another, or valid to the extent of only a part of the consideration given, would remain valid pro tanto against the trustee so far as this subdivision would apply.'" 4A *Collier on Bankruptcy* § 70.47 at 580 (14th ed. 1971).

The considerations compelling the adoption of this amendment are directly applicable to this case. Here, at best, the Trustee can set aside the assignment of rents. But he can do no more. That is, he cannot take advantage of the assignment's invalidity to defeat the otherwise valid chattel mortgage. That mortgage, and the rights created thereby should be considered separate and apart from the assignment. So considered, it is clear that the mortgage must be enforced.

POINT III

The assignment of lease was not required to be recorded. In any event, the reference thereto in a recorded document constituted actual notice thereof.

A. The recording requirements.

The foregoing discussion was predicated upon the assumption that an assignment of lease is a conveyance required to be recorded under the Federal Aviation Act. An analysis of the recording provisions of that Act and the regulations issued pursuant thereto manifests no such requirement with respect to the assignment of a *lessor's* interest under a lease, and certainly not of a *lessor's* interest in

lease rentals, which is not an interest in aircraft, but a right to money.

Section 503 of the Federal Aviation Act, 49 U.S.C. §1403, establishes a nationwide system for, as the title to that section indicates, the "[r]ecordation of Aircraft Ownership".

Subdivision (a) of that section provides, in relevant part, that a system should be maintained for the recording of "any conveyance which affects title to, or any interest in, any civil aircraft of the United States."

The term conveyance is defined by §101(17) of the Act, 49 U.S.C. §1301(17) to mean a:

> "bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property."

Pursuant to the authority granted by subdivision (g) of Section 1403, the Federal Aviation Administrator has issued regulations further defining the kinds of transactions required to be recorded. Thus, Section 49.31, 14 C.F.R. §49.31 expands the conveyance definition of §1301(17) by providing that conveyances include:

> "(a) A bill of sale, contract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of tax liens or of other lien, or other instrument affecting title to, or any interest in, aircraft."

It is significant that although this Regulation specifically added an *assignment* of a conditional sale to the definition of conveyance (an assignment of a mortgage having already been included in §1301) and although the regulation included a lease as a recordable conveyance, it refrained from adding an *assignment* of a lease to the statutory definition.

The importance of this omission is highlighted by a comparison of the foregoing Regulation with those relating to

encumbrances against engines and propellers. Section 49.41(b) and §49.51(b) of the Regulations specifically require that the assignment of the leases of engines and propellers be recorded. Since engines and propellers are interchangeable replacement parts that are more likely to be released or subleased, the Regulations expressly provide that an assignment of the Leases of that kind of equipment be recorded. The Regulations make no provision for the recording of the assignment of leases of complete aircraft. Under these circumstances, the conclusion is inescapable that the omission of an assignment of lease from both the statutory and regulatory definitions of "conveyance" was a deliberate and intentional one.

This conclusion is confirmed when the nature and purpose of the recording provisions are considered. As will hereinafter be discussed, the purpose of the recording provisions is to protect "persons who have dealt on the faith of recorded title . . . and as to whom it would be a fraud to give effect to unrecorded titles to their detriment". *Marsden* v. *Southern Flight Service, Inc.*, 227 F. Supp. 411, 415 (M.D.N.C. 1961). To fulfill this purpose the Act and the regulations require the recording of those kinds of conveyances affecting the ownership of aircraft (bill of sale or conditional sale), the use and possession of aircraft (lease); or creating liens on aircraft (mortgage, equipment trust, notice of tax lien or other lien).

The importance of these kinds of conveyances to persons dealing with aircraft is obvious. Each of those conveyances directly affects the aircraft as such. The existence of any of those interests would materially affect a subsequent purchaser or secured party. But the assignment by an aircraft lessor of the rentals from a lease cannot be said to be such an interest.

An assignment of rentals does not affect the record ownership of aircraft. It does not affect the right to pos-

session of the aircraft and is not a lien on the aircraft. The only aspect of a lease transaction of importance to a proposed subsequent purchaser or lienor is the existence of the lease itself since that directly related to possession of the aircraft. And it is for that reason that neither the statute nor the regulations require the recording of a lessor's assignment of lease.*

This is nowhere better demonstrated than by the terms of the subject assignment of lease. That assignment is concerned exclusively with the rental payments under the lease. Far from affecting any interest in the aircraft as such, the assignment expressly contains undertakings by the assignor to continue to perform its duties with respect to the aircraft and makes clear that the assignee does not have these obligations. (J.A. 13). Thus, the assignment clearly transferred only the monetary obligation of the lessee and not an interest in the aircraft itself.

The distinction between these interests was the entire predicate of this Court's opinion in the *In re Leasing Consultants, supra*, affirming on this point Judge Weinstein's opinion below. The Court there stated that the assignment of the lease therein involved operated both as an assignment of an interest in the tangible propery and as an assignment of the "receivable", that is, the right to receive the rentals. Both Courts held that the assignment of the interest in the tangible property was subject to the appropriate filing rules for equipment (under the Uniform Commercial Code in that case, or in this case under the FAA if and to the extent any interest in property was deemed to be taken under the form of assignment). But the right

* Even if a requirement of recording an assignment of lease were read into the provisions, it should be limited to the assignment only of a *lessee's* interest under a lease since such a conveyance would affect the use and control of the aircraft. The lessor's right to receive rents under a lease relates to a monetary obligation and not to the aircraft itself.

to the receivables was considered a different matter and one subject to the rules relating to perfection of an interest in the chattel paper as such under the Uniform Commercial Code. Here, the interest in the chattel paper as such was perfected by the Bank by taking possession thereof, (Uniform Commercial Code §9-305) and also by filing in New York, which is obviously the appropriate State (Uniform Commercial Code §9-304).

The distinction drawn by the Courts obviously fits in with the purpose and the exact structure of the Federal Aviation Act. The Federal Aviation Act is concerned with recording of "conveyances" of aircraft, engines, etc., 49 U.S.C. §1403(a)(1), (2) and (3) and §1403(c). It is not concerned with control or recording of monetary obligations such as receivables which arise out of transactions in aircraft. Therefore, insofar as the Federal Aviation Act requires recording of assignments of conditional sales contracts (49 U.S.C. §1301(17) and 14 C.F.R. §49.31(a)), it is concerned only with recording of that aspect of the assignment which deals with the property interest, and it does not attempt to deal with that aspect of the assignment that is concerned with the transfer of the debt.

The Trustee sloughs off the meticulous drafting of the statute and regulations and the reasoning underlying them, and argues merely that uniformity requires that all forms of chattel paper be treated alike (Brief, p. 27). He supplements that with a disingeniously erroneous assertion that the Federal Aviation Act requires that all instruments "related to aircraft" be recorded (Brief, p. 2). The statute says no such thing, as the foregoing discussion demonstrates.

Finally, it should be noted that the Act and the Regulations require the recording of instruments "affecting title to, or interest in property." Although the phrase "interest in property" is nowhere defined in the Act, that precise phrase is used in the recording section of the New York

Real Property Law, §290, *et seq.* The uniform interpretation of that phrase by the courts is illustrative here.

Section 291 provides that every conveyance of real property is invalid against certain third parties unless it has been fully recorded. The term "conveyance" is defined in §290(3) to include "*every written instrument, by which any* estate or *interest in real property is created,* transferred, mortgaged *or assigned,* or by which the title to any real property may be affected. . . ." (Emphasis added). Despite the broad language set forth in §290 and its predecessor statutes*, the Courts of this State have uniformly held that an assignment of rents accruing under a lease of real property is not a conveyance of an "interest" in real property with the meaning of the recording statute. *See, e.g., Harris* v. *Lesster,* 35 App. Div. 462, 54 N.Y.S. 864 (1st Dep't 1898) *appeal dismissed,* 159 N. Y. 533, 53 N.E. 1126 (1899), where the Court enforced an unrecorded assignment of rents, holding:

> "That assignment was not within the recording act. It in no wise affected the title to the land, nor was it a lien or encumbrance thereon." 54 N.Y.S. at 867.

To the same effect is *Monica Realty Corp.* v. *One Twenty-Two Fifth Avenue Corp.,* 264 N.Y. 52 (1934), and *Conley* v. *Fine,* 181 App. Div. 675, 169 N.Y.S. 162 (1st Dep't 1918). *Accord: Rolandelli* v. *Stanton,* 129 Misc. 270, 220 N.Y.S. 502 (N.Y. Mun. Ct. 1927); *Anderson* v. *Island Creek Coal Co.,* 297 F.Supp. 283 (W.D. Ky. 1969). Moreover, both *Harris* and *Conley* have been consistently cited with approval. *See, e.g., Witschger* v. *J. K. Marvin & Co. Inc.,* 255 App. Div. 70, 5 N.Y.S.2d 910 (2d Dep't 1938); *Rock-*

* Section 240 of the Real Property Law, the predecessor to §290, contained the same broad definition of "conveyance" and provided further that: "The terms 'estate' and 'interest' in real property include every such estate and interest freehold or chattel, legal or equitable, present or future, vested or contingent".

more v. *Lehman*, 129 F.2d 892 (2d Cir. 1942); ***Empire State Collateral Co.*** v. ***Bay Realty Corp.***, 232 F.Supp. 330 (E.D.N.Y. 1964); *New York Life Ins. Co.* v. *Fulton Development Corp.*, 265 N.Y. 348, 193 N.E. 169 (1934); *Sullivan* v. *Rosson*, 223 N.Y. 217, 119 N.E. 405 (1918). And even more significantly, the distinction between an assignment of rents due under a lease of real property and the "conveyance of an interest" in real property, as set forth in the foregoing cases, has been retained and codified by the New York State Legislature. Compare §290(d) with §294-a. In short, despite the fact that such assignments must now be recorded, the Legislature properly recognized that an assignment of rent does not constitute an "interest" in the leased property, and therefore, should not be encompassed in the operative definition of "conveyance" set forth in §290(3). These authorities suggest that the specific omission of such assignments from the FAA recording regulations was not only purposeful, but in complete accord with case law.

Under these circumstances, it is obvious that the Trustee's claim that the subject assignment is defective is without support in either the Act or the Regulations. It is equally clear that the omission of an assignment of lease from the definition of conveyance was entirely consistent with the purpose of the Act and analogous but relevant case law.

Accordingly, the conclusion is inescapable that so far as concerns a property interest in the aircraft, the security interest of the Bank was correctly perfected by recording the chattel mortgage with the FAA and so far as concerns the receivable, the security interest was correctly perfected by filing the assignment under state law and taking possession of the chattel paper in accordance with the Code.

B. The records gave actual notice of the assignment of lease.

The argument under this heading assumes that an assignment of lease rentals by the lessor is a recordable instrument under the FAA. Section 1403 (c) of the Act provides that "no conveyance . . . the recording of which is provided for . . . should be valid . . . against any person other than . . . any person having actual notice thereof, until such conveyance . . . is filed for recordation. . . ."

Conceding that the assignment was not recorded, we contend that "actual notice" thereof, within the meaning of the above language, was given by a reference to the assignment in the recorded mortgage.

The term "actual notice" found in the FAA and its predecessor the Ship Mortgage Act, 46 U.S.C.A. § 911 *et seq.* is not a usual one. It blurs the customary distinction between actual knowledge and constructive notice from a recording system. But help as to the meaning of "actual notice" can be found in cases under the two acts.

The recording requirements of the Federal Aviation Act call not merely for the filing of the conveyance but for its recordation as well. That is, the document reflecting the conveyance is, in its entirety, lodged with the recording office and subject to analysis by the whole world. Moreover, the recording system is such that all instruments relating to one aircraft are readily found by reference to the aircraft serial number. The significance of this to the case at bar is that National's mortgage makes specific and explicit reference to the assignment to it of the Grant lease in the vital clause of a mortgage, the defeasance clause. Thus, the defeasance clause commencing at the bottom of page 3 of the mortgage state (J.A. 29-30):

> "Upon condition that, until the happening of any Event of Default hereunder, subject to the terms

> and provisions of the Note, *and the assignment by the Company to the mortgagee of Aircraft Lease No. 1293, dated April 11, 1969, between this Company as lessor, and the Grant Company* the schedule covering the Aircraft attached thereto (the 'Aircraft Lease Assignment'). . . ." (Emphasis added.)

This reference to the assignment in the mortgage put anyone interested in the aircraft on notice that the Grant lease had been assigned to National even though the assignment itself was never recorded.* Since 49 U.S.C. §1403(d) invalidates a conveyance only in favor of those without "actual notice thereof", the subject assignment cannot be set aside.

Such a conclusion was reached by this Court in *The Tompkins*, 13 F. 2d 552 (2d Cir. 1926)**. In that case, the notice in question was contained in the recital of a recorded release of mortgage which was read by counsel. The court held that this reference was sufficient to put a subsequent purchaser on notice even though the conveyance referred to was not itself recorded.

The court described the types of notice involved as follows:

> "Actual notice differs from constructive notice, in that the latter is a legal inference from established facts, while actual notcie may be either actual knowledge or notice implied from the facts." *Id. at 554.*

* This reference to the Grant lease is not the only one contained in the mortgage. Indeed, that lease is referred to on six separate pages of the mortgage in those clauses governing such significant provisions as Warranty of Title § 3.1 (J.A. 35); Possession and Transfer, § 3.7 (J.A. 2); Authority to Operate § 3.10 (J.A. 43); and Default § 4.1(D)(H) (J.A. 44, 45).

** That case arose under the Federal Ship Mortgage Act, from which the recording provisions of the Federal Aviation Act were derived. *See, e.g., Marsden* v. *Southern Flight Services, Inc.*, 227 F.Supp. 411 (M.D.N.C. 1961); *Marshall* v. *Barden*, 169 Kan. 534, 220 P. 2d 187; *Blalock* v. *Brown*, 78 Ga. App. 537, 51 S.E. 2d 610.

The Court concluded that actual notice existed, stating:

> "Investigation of the release or satisfaction of the mortgage by a mere reading of the recitals, which are as important as other stipulations, would have revealed the existence of title in the appellant. Careless or indifferent reading will not excuse. There was the inlet of information to which the attorney closed his eyes and ears by an indifferent reading and the appellee Lowery must be held to have purchased with notice of the existence of title in another and therefore may not be declared a bona fide purchaser without notice of the conveyance to the appellant." *Id.*

But "actual notice" may also come from information of record. This precise question was presented in *McCausland* v. *Davis*, 204 So. 2d 334 (Fla. Dist. Ct. App. 1967). In that case, a mortgage note against an aircraft was unrecorded. However, it was referred to in a recorded bill of sale in the purchaser's title. In view of that reference, the court held that this purchaser had actual notice of the mortgage.

In *Marsden* v. *Southern Flight Service*, 227 F. Supp. 411 (M.D.N.C.1961) where a purchaser of an aircraft who failed to file his bill of sale sought to retain priority over a subsequent mortgagee on the ground that sufficient reference to his interest was contained in certain repair and alteration forms filed with the Federal Aviation Agency, the Court declined to charge the mortgagee with actual notice of plaintiff's interest because the repair forms were not "title" or "conveyance" documents required to be recorded. The court's opinion makes clear, however, that if the purchaser's interest had been referred to in a recorded conveyance, the mortgagee would have taken subject to that interest.

These cases conform to well-established law as to the effect of information on the record. As the Supreme Court held:

> "A purchaser is affected with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed." *Northwestern Nat. Bank* v. *Freeman*, 171 U.S. 620, 629 (1898).

It is equally well established that one is charged with notice of all matters affecting his title appearing in the instruments constituting the recorded claim including all recitals in such recorded documents. See, *e.g.*, *C. Callahan Co.* v. *Lafayette Consumers Co.*, 102 Ind. App. 319, 2 N.E. 2d 994 (1936); *Polston* v. *Scandlyn*, 21 Tenn. App. 252, 108 S.W. 2d 1104 (1937); *Braxton* v. *Harvey*, 82 S.W. 2d 984 (Tex. Civ. App. 1935); *Hawley* v. *McCabe*, 117 Conn. 558, 169 A. 192 (1933); *Johnson* v. *Abba*, 105 Kan. 658, 185 P. 738 (1919).

The reasoning applies with equal force to the case at bar. Here, the assignment which the Trustee attacks was referred to in a recorded document. That reference alone was sufficient to give "actual notice" of the assignment's existence under the FAA. This conclusion is particularly compelling since the mechanics of recording established by §1403(g) require that conveyance be indexed under the identifying description of the aircraft and the names of the parties to the conveyance.

Thus, the Trustee cannot claim that the assignment, if recorded, would have been indexed in a place different from the mortgage so that its absence from that place could mislead a searcher of the records. The fact is that the assignment, if recorded, would have been recorded under this same aircraft description and under the names of the same parties as the mortgage. In short, a person con-

cerned with the state of the record would have resorted to only one source, would have inquired as to only one source, would have inquired as to only one aircraft description and checked only one set of names. And that search would have resulted in actutal notice of the assignment of the lease to National.

C. The trustee is bound by the state of the record of conveyances.

The Trustee now argues that he is protected by a statutory veil of ignorance permitting him to prevail even in the face of what the records at the FAA reveal.

It is, of course, true, under § 70c of the Bankruptcy Act that the Trustee is deemed to be a creditor without notice of the transaction even if there exists, among the creditor body, those who knew of the transaction. But the notice involved in that rule is *knowledge* of the transaction and not what is disclosed by the recording of a transtion. It is only the former that the Trustee takes free of and not the latter. Surely the Trustee cannot reasonably contend that he takes free of that notice which the record reveals, for if that were true, any trustee could set aside every recorded conveyance under Section 70c. On the contrary, his rights are those of a hypothetical lien creditor, and such a creditor, of course is bound by the recording system.

In short, since the assignment was referred to in the records, the Trustee acting with the powers of a hypothetical judgment lien creditor, cannot set it aside. And this is precisely what the lower court held. The court noted that "the assignment is referred to throughout in the chattel mortgage" and held "that any reasonable creditor would have been advised by the filing of the chattel mortgage of the lease and the filing in New York" (J.A. 122). Judge Weinstein's determination is entirely consistent with the applicable law.

POINT IV

The mortgage had full effect, even if LCI may have given Grant an option to purchase. Since the option was not recorded, the transaction between Leasing and Grant was not a conditional sale.

The foregoing discussion was directed to the Trustee's contention that even if the transaction between LCI and Grant were a true lease and LCI retained title to the aircraft, the mortgage is ineffective because of the failure to record the assignment of rents. Since the Trustee was unable to connect the alleged infirmity of the assignment with the enforceability of the mortgage, he was compelled to take his argument beyond the failure to record the assignment to an attack on the mortgage itself. But the nature of this attack is a curious one, for the Trustee points to no imperfection in the mortgage and alleges no defect in the manner in which it was recorded. Instead, the Trustee argues that the mortgage is a nullity and attempts to support that claim by setting forth a series of arguments the very predicate of which is fundamentally flawed.*

* The Trustee's claim that the mortgaged property was insufficiently described is mere diversion. His argument is based on the theory that since the mortgage conveyed a mere "reversion", it should also have described the Grant lease in the granting clause. Since the mortgage fully describes the aircraft intended to be licensed, the trustee must mean that without a reference to the lease it does not describe the rentals. But this claim is belied by the document itself. It not only makes several references to the Grant lease but also grants to the Bank the right to collect the rentals therefrom (J.A. 47). Moreover, this right is what all secured parties of income producing properties obtain—and is embraced in the Code which grants to the secured party "*all* of the debtors rights" in the collateral. § 9-504. Finally, the Trustee has cited not one case to support his theory that a mortgage on income producing collateral does not cover the income as well as the property.

Thus, the Trustee alleges:

(a) At the time that LCI leased the aircraft to Grant a separate document was executed conveying to Grant an option to purchase the plane at the expiration of the lease.

(b) Under the Federal Aviation Act the existence of this option transforms the lease into a conditional sale.

(c) Since it was a conditional sale, LCI did not have title to the aircraft. At best LCI retained only a security interest in the aircraft. LCI could not transfer a lien on that aircraft to the Bank and National's chattel mortgage accordingly attached to nothing.

What the Trustee's argument overlooks is that for a lease to be considered a conditional sale, either National must have known of the option or it had to have been recorded. The fact is that in this case neither event occurred, although the Trustee has not disclosed that information to the Court and his pleadings are barren of references to this vital state of facts. Accordingly, the option is invalid except against persons with "actual notice" under the provisions of the very same statute by which the Trustee claims the assignment of lease is invalid. There is no allegation or proof that the Bank had "actual notice".

A conditional sales contract is specifically defined in Section 101(16) of the Federal Aviation Act of 1958, as follows:

> ". . . any contract for the . . . leasing of an aircraft . . . by which the . . . lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the . . . lessee . . . has the option of becoming the owner thereof upon full compliance with the terms of the contract." 49 U.S.C. § 1301 (16)(b).

This definition of conditional sale contract makes clear that a document in the form of a lease is deemed a condi-

tional sale contract only if the lease rentals constitute compensation substantially equivalent to the value of the aircraft, and if the lease is accompanied by an option. No matter how clear it might be that the lease rentals constitute compensation substantially equivalent to the value of of the aircraft,* the lease is not a conditional sale contract unless it is agreed that the lessee has the option to become the owner of the aircraft upon full compliance with the terms of the contract. 49 U.S.C. §1301(16). Therefore, the lease without the option is not a conditional sale contract. Filing the lease without filing the option would not have constituted the filing of a conditional sale contract and "acutal notice" of the lease without "actual notice" of the option is not "actual notice" of a conditional sale contract.

There is no question but that the lease together with an option conforming to the statutory requirements i.e., a conditional sales contract, is a conveyance required to be recorded. The regulations issued pursuant to the Act specifically include a contract of conditional sale in the definition of the conveyances required to be recorded under the Act. 14 C.F.R. §49.31(a). It is equally clear that under Section 1403(d) of the Act, the failure to record a conditional sales contract invalidates it as to all without actual notice.

While the Trustee is quick to seek to invalidate the assignment for lack of recording as allegedly required by Section 1403(d) of the Act, he seeks to ignore the requirement of the same Section of recording of the option. He argues that because a conditional sale relates to ownership, the existence of the conditional sale must be recognized even though not recorded (Brief, p. 32-33) because it would be incredible for ownership of aircraft to hinge on the recordation of the option. He contends that it is unlawful to have an aircraft registered other than in the name of the owner.

* Judge Weinstein had doubt on this point on the facts in this case, and did not decide it, for it was not pleaded. *See*, J.A. 18-19.

There are, however, two answers to this reasoning. In the first place, the Trustee confuses the registration provision of the Act with the recording provision thereof. Section 1401(f) of the Act resolves that confusion by specifically declaring that:

> "Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or might be, in issue."

Thus, it is clear that the status of registration has nothing to do with title controversies. Title controversies are controlled by the recording section.

This leads to the second point, that the Trustee's argument results in an absurdity. If an absolute bill of sale to an aircraft were unrecorded, the registration would be faulty, but there could be no question that the grantor still retained such apparent ownership as to validate a chattel mortgage if he executed it and if it were recorded while there was the outstanding bill of sale not of record, and of which the chattel mortgagee has no actual notice. The same is also true of a chattel mortgage executed when a conditional sale is not of record.

The final absurdity of the argument that the quasi-criminal nature of the Act requires the recognition of Grant as owner of the plane is that Grant never registered itself as owner. Rather, as part of the purchase by it of the plane in 1973, Grant insisted upon and obtained a bill of sale from the trustee (Stip. ¶13, J.A. 111). Now if, as the Trustee contends, Grant was already the owner, it need not have insisted upon a bill of sale. Moreover, to the extent that the regulations or provisions of the Act were violated, it was LCI, its Trustee and Grant who violated them, not National. How their failure to register ownership in Grant should result in this court's holding that there was such ownership is not clear. The fact remains that, as a matter of record, LCI was the owner of the aircraft.

In summary, the very bedrock of the Trustee's attack on National's mortgage is fundamentally flawed. Since the transaction could be a conditional sale only because of the option and since the option was not recorded, it is clear that the transaction was not a conditional sale as to National and that Leasing was capable of conveying a security interest in the aircraft to National.

POINT V

Even if the transaction were a conditional sale, National is still entitled to prevail under the mortgage.

Although a determination that the transaction was a conditional sale binding on National would be absolutely essential to the remainder of the Trustee's theory, such a determination would by no means be dispositive of National's rights. The Trustee argues that with such a determination LCI would not retain title to the aircraft, would have only a security interest therein, and would be incapable of conveying a chattel mortgage to National. But such a determination would not affect National's substantive rights, for the simple reason that the Act is not a substantive statute. While liens must be recorded with the FAA, once recorded, their extent, scope and validity are governed by state law, which in this case is the Uniform Commercial Code ("Code").

The Act itself recognizes the pre-eminence of state law with respect to the validity of all recordable conveyances. Section 506 provides:

> "The validity of any instrument the recording of which is provided for by Section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United

> States in which such instrument is delivered, irrespective of the location of the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified herein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified." 49 U.S.C.A. § 1406.

The cases acknowledge that by requiring central filing of aircraft titles Congress did not intend to nullify state law. See cases cited in Point I(B) *supra*.

As one commentator has noted:

> "Except for the engine and spare parts li[illegible] §503 is not in any sense a substantive statute. Therefore, it is believed, apart from these substantive provisions, the question of formal requisites, and the operation of the recording system, state law should apply to determine any question arising in connection with a security interest in aircraft."

II Gilmore, Security Interests in Personal Property § 13.5 at p. 426 (footnote omitted).

The Comment to §9-104(a) of the Code is in accord:

> "Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article. The Ship Mortgage Act, 1920, is an example of such a federal act. Legislation covering aircraft financing has been proposed to the Congress, and, if enacted, would displace this Article in that field. The present provisions of the Civil Aeronautics Act (49 USCA §523) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator* and such registration is recognized as equivalent to filing under this Article (Section 9-302(3)); but to the extent that the Civil Aeronautics Act does not

* The revised 1972 Comments refer to the Federal Aviation Act.

> regulate the right of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article, pending passage of federal legislation." Uniform Commercial Code §9-104, Comment 1.

Thus, it is clear that in determining what interest in the aircraft National obtained by recording its chattel mortgage, resort must be had to the Code. And under the Code, there is no question but that National, by virtue of its chattel mortgage, obtained a security interest both in the aircraft and in the rentals after default, even if the transaction between LCI and Grant were a conditional sale.

Since the enactment of the Code, all notions of title, as well as all distinctions among chattel mortgages, conditional sales and other security devices have been obliterated, there having been substituted in their places a single security device called a security interest.

As this Court held in *In Re Yale Express System, Inc.*, 370 F. 2d 433 (2d Cir. 1966):

> "In short, it does not matter whether the security agreement is in the form of a chattel mortgage or a conditional sales contract. In either case, the secured party has the right upon default by the debtor to take possession of the collateral (§9-503) and to sell, lease or otherwise dispose of it, applying the proceeds to the indebtedness (§9-504)." *Id.* at 437.

Thus, it is wholly immaterial, under the Code, whether the underlying transaction was styled a conditional sale, a lease or a chattel mortgage. With respect to each of these transactions, and without regard to the way it was characterized, LCI would retained a sufficient interest in the aircraft to have been a predicate of National's security interest.

Even if the transaction were, as the Trustee contends, a conditional sale, LCI, as vendor, retained a security interest in the aircraft, to secure payment of the rentals. To say this, however, does not mean that the Bank could not succeed to Leasing's interest in the aircraft and to the rentals. Indeed, the conveying of such a security interest is the typical way that automobile and equipment dealers finance their operations. As the official comments to §9-105 of the Code state:

> "A dealer sells a tractor to a farmer on conditional sales contract. The conditional sales contract is a 'security agreement, the farmer is the 'debtor, the dealer is the 'secured party' and the tractor is the type of 'collateral' defined in Section 9-109 as 'equipment'. But now the dealer transfers the contract to the bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment the conditional sales contract is now the type of collateral called 'chattel paper'. In this transaction between the dealer and his bank, the bank is the 'secured party', the dealer is the 'debtor', and the farmer is the 'account debtor'." Uniform Commercial Code § 9-105, Comment 4.

This transfer of a conditional sales contract to a bank is a chattel paper transaction whereby the Bank obtains a security interest in the debt as well as in the specific equipment. Chattel paper is explained in the comment to §9-105 of the Code, as follows:

> "'Chattel paper' To secure his own financing a secured party may wish to borrow against or sell the security agreement itself *along with his interest in the collateral* which he has received from his debtor." Uniform Commercial Code §9-105, Comment 3. (Emphasis added.)

Thus, under the Code, even if the transaction were a conditional sale, LCI could convey its interest in the aircraft and the rentals to National. It was this precise interest that the parties manifestly intended to convey by the chattel mortgage and what any third party would have concluded was conveyed as a result of the filing of the chattel mortgage with the FAA. To say that National obtained no rights by virtue of that filing because it should have more properly styled its interest as an assignment of a conditional sale is unnecessarily to exalt form over substance, since under the Code National's interest is the same whether it is a chattel mortgagee or an assignee of a conditional vendor. In either case, National would have a security interest in the aircraft. In either case, National would be entitled on Leasing's default, to collect the Grant rentals. And in either case National would be entitled to sell the aircraft. In short, National's rights would be the same whether the underlying conveyance to it was a chattel mortgage or the assignment of a conditional sales contract.*

Because there is no substantive difference between a chattel mortgage and the assignment of a conditional sale, the trustee's contention that the Bank lost all of the benefits of its bargain by characterizing the transaction as one rather than the other is singularly without merit. Indeed this distinction without a difference was specifically rejected by this Court in *In Re Yale Express, supra*, where the Court said:

> "Since the Uniform Commercial Code has abolished the technical distinctions between the various security devices, the federal bankruptcy courts

* It cannot be overemphasized that from a notice point of view it is immaterial how National's interest was described. For in either event, it would have been indexed under the craft description and the names of the parties (§ 1403(f)), sufficiently putting the world on notice of the existence of a creditor's interest in the craft.

> should no longer feel compelled to engage in the purely theoretical exercise of locating 'title;' nor should considerations of where 'title lies' influence the courts in the exercise of their equitable discretion. Rather, the bankruptcy courts should assume their proper equitable function of scrutinizing the particular circumstances surrounding each petition for reclamation, in order to arrive at a just determination. Equitable considerations and the *substance* of the transaction should govern, regardless of the *form* of the security agreement." 370 F.2d at 437-38.

Had the transfer of the putative conditional sale to National been in conventional form, there would be, of course, nothing to the Trustee's complex arguments. However, since National did not know of the unrecorded option, it used two different instruments to reflect its interest; the chattel mortgage and the assignment of rents. Together both instruments had the same effect as an assignment of the conditional sale contract for two reasons:

First, since the Code abolishes distinctions between forms, the chattel mortgage has the same effect as the transfer of the security interest retained by Leasing in the aircraft. Since it concerns the aircraft, the chattel mortgage was properly recorded with the FAA.

Second, the assignment of lease rentals should be given effect as an assignment of the monetary aspect of the conditional sale contract. Since this has nothing to do with aircraft, it was properly perfected by National's possession of the lease and by filing financing statements under the Code in New York.*

* National's possession of the lease as chattel paper is sufficient to perfect its security interest therein. It is therefore unnecessary for the Court to consider whether National's interest therein was perfected by filing in New York. In any event the Trustee's suggestion that National had misfiled (Brief, p. 21), was not pleaded and not considered in the District Court.

The Trustee attempts to confuse the issue (Brief, p. 38) by citing from a statement by Professor Homer Kripke, writing the "Practice Commentary" to § 9-302 of McKinney's edition of the New York Uniform Commercial Code, Title § 2½, Part 3, p. 455. Professor Kripke there said: "The assignment of the debt must be perfected by the rules relating to the assignment of chattel paper." That is exactly correct. The decision of this Court in *In re Leasing Consultants, Inc., supra*, makes clear that in the case of true leases, perfection as to the equipment and perfection as to the debt are separate problems. Perfection as to the debt is not controlled by the Federal Aviation Act, but was effectively accomplished by the New York filing on the chattel paper and the taking of possession thereof. Perfection as to the equipment was accomplished by the filing of the chattel mortgage.

Accordingly, even if the transaction were a conditional sale, National properly perfected its interest by recording the mortgage and filing the financing statements.

POINT VI

The Trustee's causes of action are barred by the two year statute of limitations of Section 11(e) of the Bankruptcy Act.

This action was brought by the Trustee on January 31, 1974, more than three years after the filing of the petition in Bankruptcy. Adjudication was on October 4, 1970. The action is therefore barred by the two year statute of limitations of Section 11e of the Bankruptcy Act. Because of an assertion on page 10 of the Trustee's brief that National agreed to toll the statute of limitations we note that the Trustee discovered his contentions in January, 1973, more than two years after adjudication (J.A. 84) and it was only

after that discovery that National agreed to toll the statute as to future lapse of time.

Section 11e of the Bankruptcy Act, 11 U.S.C. § 29(e), provides in relevant part:

> "A . . . trustee may within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate. . . ."

The Supreme Court in *Herget* v. *Central National Bank & Trust Co.*, 324 U.S. 4 (1945), considering the applicability of the two year provision contained in § 11e to a preference action brought under § 60 of the Bankruptcy Act, held that the limitation provision applied to causes of action asserted by the trustee and arising under the Bankruptcy Act itself. The Court said:

> "The actual language used in 11e is clearly appropriate to an action under § 60. Section 11(e) is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the federal or state law permits, provided such law did not bar the action on the date when the petition was filed.
>
> Here the only applicable law is § 60 of the Bankruptcy Act, which generates the cause of action and which contains no time limitations as to actions brought pursuant thereto." *Id.* at 8

Section 70c, upon which the Trustee now relies, with three formulations, gives the Trustee, in substance, the rights of a hypothetical judgment creditor who obtains a lien on personal property by levy on the date of bankruptcy. This

power is based exclusively on the existence of the *hypothetical* judgment lien *on the date of bankruptcy, not before.*

This was emphatically held in *Lewis* v. *Manufacturers National Bank*, 364 U.S. 603 (1961), overruling *Constance* v. *Harvey*, 215 F. 2d 571 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955), which had held that the Trustee might derive his powers from conditions antedating the date of bankruptcy. Because this cause of action is that of the Trustee as a hypothetical judgment creditor and is not derivative from the powers of the bankrupt or of any actual creditor, and because it arises on the date of bankruptcy and not before and by reason only of the Bankruptcy Act, this cause of action under § 70e cannot have the benefit of any state or federal statute of limitations except the two year statute of § 11e. In that respect it is precisely like the preference section § 60a and b, which gives the Trustee rights to avoid a preference which do not otherwise exist. Therefore, after two years the cause of action is barred by § 11e. The doctrine and reasoning of the *Herget* case, *supra*, although that was not a § 70e case, are fully applicable.

POINT VII

The Trustee lacks capacity to sue under both Sections 70e and 70c* of the Bankrupcty Act.

Although the Trustee is vested with broad powers under the Bankruptcy Act, those powers are not without limitations. The Trustee is not a bona fide purchaser for value or a bona fide encumbrancer for value of the bankrupt's assets. Instead, as an initial proposition, he takes whatever title to goods the bankrupt is capable of delivering and sub-

* It is questionable whether the Trustee should be permitted to mount a new theory of avoidance on appeal in a plenary suit since the cause of action under § 70c is different from that pleaded. However, we respond to the present argument on the merits.

ject to all liens, claims and equities. *Matter of James, Inc.*, 30 F.2d 555 (2d Cir. 1929); 4A COLLIER ON BANKRUPTCY ¶70.79 (14th ed. 1971).

Similarly, although the trustee is empowered to challenge some unrecorded transfers made by the bankrupt, there is no general proposition floating in the air that every unrecorded conveyance is invalid against a trustee. A trustee has a variety of statutory sections to use as weapons with which he can invalidate transfers of the assets of the bankrupt in a consensual transaction, and he must bring his attack within the terms of one of those sections.

Initially, the Trustee chose to base his attack on Section 70e of the Bankruptcy Act, 11 U.S.C. § 110(e). Under that section the Trustee has the burden of demonstrating the existence of some actual creditor with a provable claim as to whom the failure to record granted a superior right over the transferee. 4A COLLIER ON BANKRUPTCY, ¶70.71; ¶70.90. When the Trustee found himself unable to meet this burden, he dropped his reliance on Section 70e and now presses the claim of a hypothetical judgment lien creditor under Section 70c of the Bankruptcy Act, 11 U.S.C. § 110(c).

In either case, however, the critical question is whether the creditor, actual or hypothetical, on whose behalf he is suing has the right, under the particular recording act involved, to challenge unrecorded conveyances. The simple answer in this case is that there is no such creditor, since the recording provisions of the Federal Aviation Act are designed to protect only those who acted in reliance on the record and not those who are mere judgment creditors of the transferor.

A reading of the recording provision of the Act demonstrates that Congress intended to protect only those who acted in reliance on the state of the record. Indeed, the Act does not declare unrecorded conveyances to be void. Instead, under the Act it is clear that conveyances are valid

as between the parties to the transaction and as against those with actual notice thereof. The Act protects only those who acted without actual notice of the transaction.

This manifest purpose of the Act has been acknowledged by the courts. In *Marsden* v. *Southern Flight Service, Inc.*, *supra*, the court stated that the purpose of the Act was to protect:

> "[P]ersons who have dealt on the faith of recorded title . . . and as to whom it would be a fraud to give effect to unrecorded titles to their detriment." 227 F.Supp. at 415.

The Ship Mortgage Act, predecessor of the Aviation Act, has also been held to protect only those acting in reliance on the record. In *James Stewart & Co.* v. *Rivara*, 274 U.S. 614, 618 (1927), the Court held:

> "The Recording Act was passed to furnish information as to title and to protect bona fide purchasers."

In those cases considering the relative rights of attaching creditors against those of unrecorded purchasers or secured parties, the courts have uniformly upheld the rights of the unrecorded parties on the ground that the attaching creditor or levying judgment creditor had not acted in reliance on the record. In *Marshall* v. *Bardin*, 169 Kan. 534, 220 P. 2d 187 (1950), plaintiff sought to collect from Central Airparts for repair of various airplanes and attached the plane in question. Anderson intervened, claiming to have title pursuant to an unrecorded oral agreement antedating the attachment. The court concluded that while persons who have dealt on the faith of the record title should be protected, an attaching creditor is not a purchaser for value on the strength of the record title.

Curtis v. *Carey*, 393 S.W.2d 185 (Tex. Civ. App. 1965), also gave priority to an antecedent unrecorded purchaser

over an attaching creditor. This case involved an action for wrongful conversion of an airplane against a judgment creditor of the plaintiff's vendor. The court, relying on *Marshall, supra,* declared that the recording provisions are to protect innocent purchasers and others dealing with the aircraft who do not have actual notice of any conveyance and that an attaching creditor is not a purchaser for value, buying upon the strength of a recorded title. To the same effect is *Smith* v. *Joliet Airmotive, Inc.,* 35 Ill. App.2d 2, 181 N.E. 2d 817 (Ill. App. Ct. 1962). See, also, *Aero Corp.* v. *Associated Aerial Survey Co.,* 184 F.Supp. 821 (D. Md. 1960) and *Marrs* v. *Barbeau,* 336 Mass. 416, 146 N.E.2d 353 (1957).

The Trustee has sought to put us at a disadvantage by not dealing with this point in his initial brief, although he is aware of the question of his standing. He did state in his brief below that he "*believes* that the intent of the Federal Aviation Act was to invalidate unfiled conveyances against general creditors."

Surely, more than mere "belief" is required for the Trustee to sustain his right to sue. Certainly in light of the fact that the courts construing the statute here in suit have uniformly rejected the precise claim advanced by the Trustee here, one could expect some exposition of the basis of the Trustee's standing to sue. The simple answer is that the Trustee lacks such capacity whether he stands in the place of an actual creditor or a hypothetical lien creditor, since neither class of creditor was intended to be protected by the recording provisions of the Act.

POINT VIII

A determination in two related cases is not necessarily dispositive of National's rights.

Some time prior to the commencement of the action against National, the Trustee instituted suit in the Southern District Court against First National City Bank and Chase Manhattan. Those actions challenge the credit extended by those banks to LCI in connection with its leasing of aircraft. The appeals from decisions adverse to the banks in these cases are now pending and it is believed that National's appeal will be consolidated therewith.

Although all three cases involve several common questions*, there are nevertheless substantial differences among them so that a decision against First National and Chase Manhattan should not be controlling in National's case.

In the case involving First National City, the bank made a loan to LCI secured by the assignment of the leases of certain aircraft. The bank did not obtain a chattel mortgage. Since First National City did not have a chattel mortgage this Court, in the First National appeal, will not have occasion to consider the rights of a chattel mortgagee —the principal question presented on National's appeal.

In the case involving Chase, that Bank made a loan to LCI, obtained and recorded a chattel mortgage on the aircraft but failed to record the assignment of lease. Although at first reading the Chase case appears similar to the instant one, there are aspects of the case making it radically different.

In the first instance, as part of the settlement of a separate action involving the lessee of the aircraft, Chase

* Among the common questions are the applicability of the statute of limitations, the trustee's standing to sue and the necessity of recording the assignment of lease.

assigned its chattel mortgage to it. National here did no such thing. Secondly, the Chase mortgage makes absolutely no mention of the assignment of the lease. This is a matter of particular significance since the decision of Judge Bauman turned on the question of whether the recording of the chattel mortgage gave sufficient notice of the assignment of lease. Thus, Judge Bauman found:

> "[t]hat the filing of the mortgage was inadequate to confer the actual notice of the assignment contemplated by 49 U.S.C. §1403(c) upon the trustee." *Feldman* v. *Chase Manhattan Bank, N.A.*, 368 F. Supp. 1327, 1332 (S.D.N.Y. 1974).

In National's case, the mortgage does, in fact, make reference to the assignment. Thus, to the extent that the Chase appeal depends on a finding of lack of notice in the mortgage, that consideration would not be applicable in National's case. Accordingly, if the appeals in all three cases are not disposed of on the common questions, the decision of Judge Weinstein should be affirmed on the grounds other than those advanced by First National City or Chase Manhattan.

Conclusion

To secure a rather substantial loan National obtained, at the least, a security interest in an aircraft and its rentals effective upon the borrower's default. For years the Trustee himself recognized the pre-eminence of the Bank's position and characterized the transaction in the simple terms that properly befit it.

If the Trustee had not permitted National to collect the installments due on the mortgage and note and if he had voiced his objection at the outset of the bankruptcy, this case would have appeared as simple as it undoubtedly did to the Trustee during the years he sat quietly back.

Now by stressing first the assignment and then the option the Trustee has distorted the transaction beyond recognition, all in an effort to draw attention away from the Bank's validly executed and duly recorded mortgage. One searches the Trustee's brief in vain for one clear, concise, authoritative statement as to why that mortgage should be ignored. Instead one is met with a melange of conclusory arguments composed of a shifting reliance on the FAA and then the Code, and advanced under § 70(e) of the Bankruptcy Act and then under § 70(c) so that at the end all perspective is lost.

But the Trustee should not be permitted to profit from a complexity of his own making. The simple irreducible fact of this case is that National has a valid chattel mortgage pursuant to the terms of which it is entitled to the precise monies claimed by the Trustee. The Trustee has offered no reason why that mortgage should not be enforced.

Accordingly, it is respectfully requested that the decision below be affirmed.

Respectfully submitted,

COLE & DEITZ
Attorneys for Defendant-Appellee

HOMER KRIPE
Of Counsel

In the
United States Court of Appeals
for the Second Circuit

George Feldman, Trustee in Bankruptcy of
Leasing Consultants Incorporated, Bankrupt
Plaintiff-Appellant,

against

National Bank of North America
Defendent-Appellee.

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Gramercy Park South , in the Borough of Manhattan , City of New York. On the 29th day of November, 19 74, at 3:30 o'clock PM , I served 3 copies of the Brief of Defendent-Appellee

in the above-entitled action on:

Hahn Hessen & Margolis
350 Park Avenue
New York, N.Y.

the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Robert E. Clay

Sworn to before me this
29th day of November, 19[illegible]

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-[illegible]3056
Qualified in Nassau County
Commission Expires March [illegible]